82-1547

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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MARJORIE LOUISE DABNEY,
*Petitioner,*

v.

MONTGOMERY WARD & CO., INC.,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTIONS PRESENTED

1. Did the District Court have discretion to preclude testimony from a witness who had not been listed pursuant to the Final Pretrial Order entered under Rule 16, Federal Rules of Civil Procedure, when relief from that Order was not sought until the start of trial, and the District Court considered all relevant factors, including the timing of the request, the prejudice to the party against whom the testimony would be offered, and the absence of a showing of excuse for the failure to disclose the witness earlier?

2. Is it within the proper scope of appellate review for a Court of Appeals to reverse a Judgment, upon a jury verdict, solely because it would have exercised its discretion differently with respect to granting that relief from the Final Pretrial Order?

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Petitioner Marjorie Louise Dabney respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 18, 1982.

## OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix ("App."), *infra*, 1a-8a) is reported at 692 F.2d 49. The Opinion of the District Court (App. 9a-16a) is not reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1982 (App. 17a). A timely petition for re-

hearing and suggestion for rehearing en banc was denied on October 19, 1982 (App. 18a, 19a). By Orders dated January 10, 1983, and February 7, 1983, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including March 18, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## RULE INVOLVED

Rule 16, Federal Rules of Civil Procedure, provides:

*Rule 16. Pre-Trial Procedure; Formulating Issues*

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discre-

tion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

## STATEMENT OF THE CASE

Invoking Federal jurisdiction under 28 U.S.C. § 1332, Petitioner Marjorie Louise Dabney filed this action in the United States District Court seeking damages for serious injuries she sustained in a fire. Petitioner claimed that the fire was caused by defects in a heater sold by Respondent; Respondent contended that the fire was caused by Petitioner's falling asleep as she smoked a cigarette while under the influence of alcohol.

By consent of the parties, pursuant to 28 U.S.C. § 636(c), a United States Magistrate conducted all proceedings in this matter. At the start of the trial, immediately before jury selection was to begin, counsel for Respondent requested leave to call a witness who had not been identified on Respondent's witness list. Both parties had been required to list their trial witnesses by the Final Pretrial Order entered pursuant to Rule 16, Federal Rules of Civil Procedure. Respondent's counsel stated he had learned of the identity of this witness from one of Respondent's managerial employees on the morning of the trial; the Record is silent as to how long Respondent was aware of the witness before it advised its counsel about her. Although by Interrogatory Petitioner had asked Respondent in discovery for the names of "all persons having knowledge or information of the facts and circumstances surrounding this lawsuit," Respondent assayed no showing of what, if any, efforts it had undertaken to find the witness earlier. The District Court denied Respondent's request as untimely and unfairly prejudicial to Petitioner, because Petitioner would not have had sufficient time to investigate and meet this witness's proffered testimony (App. 20a-26a).

After a 6-day trial, the District Court entered judgment for Petitioner, upon the jury's verdict, for $1,000,000, plus interest and costs (App. 27a). The Court denied Respondent's Motion for a New Trial, under Rule 59, Federal Rules of Civil Procedure, which was based in part upon its request for leave to allow testimony from the alleged "newly discovered" witness. In its Opinion denying Respondent's Motion, the Court added that, although "no bad faith" on the part of Respondent's counsel was involved regarding the "last-minute witness", "it is not clear how long [Respondent] had knowledge of the witness . . . . The Court is of the opinion . . . that it did not abuse its discretion in refusing testimony by this witness due to such late notice on [Respondent's] part" (App. 13a). "The time for discovery and investigation was prior to trial" (App. 14a).

The United States Court of Appeals for the Eighth Circuit reversed the District Court's judgment on the sole basis that the District Court had "abused its discretion in denying defendant's request to amend its witness list . . . and in refusing thereafter to grant defendant a new trial" (App. 8a). This ruling of the Court of Appeals was made in the absence of any evidence of record as to what the witness would testify, and without requiring a showing by Respondent that the delay in disclosing the witness was excusable. The Court based its conclusion upon its belief that the witness, if allowed to testify, would say that she had observed Petitioner, several hours before this fire occurred, "in an intoxicated condition" (App. 4a).

The only foundation for the Court's understanding of what the witness would testify was the oral proffer made by counsel for Respondent during the trial (App. 25a). At no time did Respondent file a sworn statement of the witness; no sworn statement was filed in support of its request for relief from the Final Pretrial Order at the outset of the trial, in support of its formal proffer at the

conclusion of the trial, or in support of its Motion for a New Trial.[1]

## REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals departs from several decisions of this Court requiring the Courts of Appeals to defer to District Courts on matters of case management. It appears to be another in a line of Eighth Circuit decisions failing to give proper deference to the District Court in such matters. It is in conflict with decisions of four other Courts of Appeals in Rule 16 witness-preclusion cases. The decision undermines the efforts of the District Courts to monitor more tightly the conduct of civil litigation, and authorizes the disregard of pretrial orders to the detriment of the sound and orderly administration of justice.

1. The decision below conflicts with this Court's direction that the Courts of Appeals give substantial deference to decisions of the District Courts on matters of case management. The Court stated this rule of limited review and its rationale in *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1 (1980):

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[1] After the Court of Appeals denied Petitioner's timely Petition for Rehearing and Suggestion for Rehearing En Banc, Petitioner obtained the sworn statement of the "last-minute witness." The witness has now sworn that, if called to testify by either party, she will not testify that she believed Petitioner was intoxicated or unusually careless with her smoking habits, or that she had told trial counsel for Respondent that Petitioner was intoxicated. On the basis of this substantial and controlling intervening circumstance demonstrating, in Petitioner's view, that the Eighth Circuit labored under a misapprehension with respect to the essential predicate of its decision—the nature of this witness's testimony—Petitioner moved in the Court of Appeals for leave to file a second Petition for Rehearing, out-of-time, and annexed the Petition and the sworn statement. No opposition to that Motion was filed. The Court of Appeals denied the Motion (App. 28a).

"What the Court of Appeals found objectionable about the District Judge's exercise of discretion was the assessment of the equities involved.

* * * *

"[T]he proper role of the court of appeals is not to reweigh the equities or reassess the facts but to make sure that the conclusions derived from those weighings and assessments are juridically sound and supported by the record.

* * * *

"[O]nce such juridical concerns have been met, the discretionary judgment of the district court should be given substantial deference . . . . The reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable.

* * * *

"The question in cases such as this is likely to be close, but *the task of weighing and balancing the contending factors is peculiarly one for the trial judge, who can explore all the facets of a case.* As we have noted, *that assessment merits substantial deference on review.* Here, the District Court's assessment of the equities between the parties was based on an intimate knowledge of the case and is a reasonable one." 446 U.S. at 9-10, 12 (footnote omitted) (emphasis added).

This rule requiring appellate restraint has been adhered to on numerous occasions, including those involving such questions under the Federal Rules of Civil Procedure as whether a decision disposing of some but not all claims in suit should be certified for immediate appeal pursuant to Rule 54(b), *Curtiss-Wright Corp., supra*; whether sanctions for failure to make discovery should be ordered under Rule 37, *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (*per curiam*); and whether leave to amend a complaint should be allowed under Rule 15(a), *Zenith Radio Corp.*

v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971). When a Court of Appeals has failed to accord proper deference to a District Court on such case management matters, this Court has not hesitated to correct the error. *Smith* v. *Black Panther Party*, 458 U.S. ——, 102 S.Ct. 3505 (1982), *vacating* 661 F.2d 1243 (D.C. Cir. 1981) (Rule 37); *National Hockey League, supra.*

Over 35 years ago, this Court examined the proper role of the Courts of Appeals in reviewing the District Courts' denials of new trial motions in criminal cases. "[W]e think it important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances." *United States* v. *Johnson*, 327 U.S. 106, 111 (1946). The holding of *Johnson* is that a Court of Appeals does not sit to try *de novo* motions for a new trial; an appellate court "should never [intervene] where it does not clearly appear that the [District Court's] findings are not supported by any evidence." 327 U.S. at 112, 113. The Eighth Circuit failed to heed this proscription, of importance for civil as well as criminal cases.

The Court of Appeals here failed to give proper deference to the District Court's determination. It reweighed the equities and gave disproportionate emphasis to those which it perceived to favor deviation from the Final Pretrial Order. But these cases teach that merely because the Court of Appeals might have come to a different conclusion, had the question been before it for the first time, it may not substitute its judgment for that of the District Court. And the failure to keep within such bounds apparently is not uncommon in the Eighth Circuit. *See ACF Industries, Inc.* v. *EEOC*, 439 U.S. 1081, 1088 (1979) (Powell, J., with Stewart and Rehnquist, JJ., dissenting from the denial of certiorari in *EEOC* v. *ACF Industries, Inc.*, 577 F.2d 43 (8th Cir. 1978) (Rule 37)

("[i]t is a serious matter for a court of appeals to undercut a district court's authority on questions of this kind, which are peculiarly within its discretion and competency" (footnote omitted)).

2. Four other Circuits have previously determined witness-preclusion cases, with circumstances either essentially equivalent to those presented here or indeed more favorable to allowing the testimony, with holdings against relaxation of the Final Pretrial Order in each case. *Napolitano* v. *Compania Sud Americana De Vapores*, 421 F.2d 382, 385-387 (2d Cir. 1970) (witnesses disclosed 4 days before trial; testimony precluded); *Lirette* v. *Popich Bros. Water Transport Inc.*, 660 F.2d 142, 144-145 (5th Cir. 1981) (witness disclosed morning of the trial; testimony precluded); *Davis* v. *Marathon Oil Co.*, 528 F.2d 395, 403-404 (6th Cir. 1975), *cert. denied*, 429 U.S. 823 (1976) (witnesses disclosed 3 days before trial; testimony precluded); *Smith* v. *Ford Motor Co.*, 626 F.2d 784, 794-800 (10th Cir. 1980), *cert. denied*, 450 U.S. 918 (1981) (witness disclosed 2½ months before trial, but challenged testimony related to subject matter not disclosed before trial; testimony precluded).

3. Whether a District Court should modify a Final Pretrial Order to allow an additional witness depends on the balance of several relevant considerations: the prejudice to the party seeking the modification if its request is denied; the prejudice to the other party if the request is granted; the impact that the modification would have upon the orderly and efficient administration of the case; and the degree of wilfullness, bad faith, or inexcusable neglect on the part of the litigant seeking the modification. *See, e.g., United States* v. *First National Bank of Circle*, 652 F.2d 882, 887 (9th Cir. 1981). Here the District Court exercised its discretion informed by consideration of all these relevant factors; its decision declining relief from the Final Pretrial Order turned on the prejudice to Petitioner, the impact upon the trial of this case,

and the failure of Respondent to show the absence of inexcusable neglect. The Court of Appeals simply weighed these considerations differently, but it was improper for it to do so.

The consequence of this decision upon Petitioner is particularly harsh. This case has been pending for over three years. There were 23 months of pretrial proceedings. Instead of recovering an award to compensate her for her injuries, as the jury and the District Court determined, she now must proceed with a second trial, over five years after the fire occurred. And she must proceed all the while with the knowledge that the predicate of the Court of Appeals' decision—the anticipated substance of the testimony of the "new" witness—was erroneous.[2]

The even and certain management of cases under Rule 16 is important for the sound administration of justice. To emphasize Rule 16's utility as a means of securing the just, speedy, and inexpensive determination of controversies, the Judicial Conference of the United States has recently proposed amendments to Rule 16 that would ensure closer and more effective scheduling, management, and control of litigation by the District Courts. *See* Report of the Judicial Conference Committee on Rules of Practice and Procedure, Appendix C, September 1982; Rule 1, Federal Rules of Civil Procedure. The Eighth Circuit's decision is a retreat from these salutary advances. Instead of fostering the use of the Final Pretrial Order to define and simplify factual and legal issues, to lessen surprise at trial, and to promote the efficient disposition of cases, it may encourage requests for relaxation of Final Pretrial requirements, authorize the liberal allowance of such modifications, and condone the "late listing" of witnesses or documentary evidence as a matter of trial strategy. Further, although the decision did not turn on the power of United States Magistrates, it may be read to undermine the authority conferred on

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[2] *See* note 1 *supra*.

Magistrates by the Federal Magistrates Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (1979), to preside over civil trials.[3] The decision in capsule exemplifies why "the best way to insure an effective pretrial conference system is to keep appellate interference to a minimum." 6 C. Wright & A. Miller, Federal Practice and Procedure § 1526, at 599 (1971) (footnote omitted).

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the Judgment and Opinion of the Eighth Circuit.

Respectfully submitted,

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March 18, 1983

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[3] If so, the Opinion would inhibit current progress toward the alleviation of congested calendars. According to the Administrative Office of the United States Courts, an increasing number of litigants are consenting to Magistrates' presiding over the disposition of civil cases. For the 12-month period ending June 30, 1982, United States Magistrates handled 2,452 civil consent cases, pursuant to 28 U.S.C. § 636(c), an increase of 26.8 percent over the preceding 12-month period. Administrative Office of the United States Courts, The United States Courts: A Pictorial Summary For the Twelve-Month Period Ended June 30, 1982, at 3-4.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 82-1062

MARJORIE LOUISE DABNEY,
*Appellee,*

v.

MONTGOMERY WARD & CO., INC.,
*Appellant.*

Submitted June 18, 1982

Decided Aug. 18, 1982

As Modified Sept. 9, 1982

Rehearing and Rehearing En Banc
Denied Oct. 19, 1982

Before HEANEY and ARNOLD, Circuit Judges, and REGAN*, Senior District Judge.

REGAN, Senior District Judge.

In this product liability case plaintiff recovered a judgment of $1,000,000 plus prejudgment interest for damages she sustained as the result of serious burn injuries caused by a fire in her rented duplex apartment on October 15, 1977. Defendant appeals from the denial of its post-judgment motions. We reverse and remand.

The principal issue on appeal is whether the district court[1] abused its discretion by denying defendant's motion for a new trial based on the ground the Court had erred in refusing leave to defendant to produce a witness

* John K. Regan, Senior District Judge, Eastern District of Missouri, sitting by designation.

[1] The Honorable R. E. Longstaff, United States Magistrate of the United States District Court for the Southern District of Iowa.

who had not been listed but whose existence and relevant testimony first came to defendant's knowledge two hours before leave was requested on the morning the trial had been scheduled to commence.

It was plaintiff's trial theory[2] that a space heater sold by Montgomery Ward to the owner of the duplex, and which had been installed in 1964 (some thirteen years earlier) in the wall between the kitchen and living room for heating the small one bedroom apartment was defectively designed, in that the flame at the burner "licked" out into the outer chamber of the heater instead of being confined inside the heat exchangers, with the result, in the opinion of plaintiff's experts, that the flames had ignited small dust or lint particles which were then carried by air currents to the "point of origin" of the fire.

Defendant contended that the more likely cause of the fire was a lighted cigarette dropped by plaintiff at or before the time she fell asleep on the living room couch under the influence of alcohol. The testimony which defendant was precluded from adducing was probative of this theory.

Plaintiff had moved into the apartment in February, 1975. She had had no problems with the space heater prior to the fire. For that matter there is no evidence of any problem with the space heater which had been experienced by anyone from the date of its 1964 installation to the time plaintiff's expert witnesses examined it in 1980.

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[2] Initially, plaintiff theorized that the heater's control valve which was manufactured by Honeywell, Inc. (an original co-defendant) was defective and malfunctioned, causing an improper flow of gas and delayed ignition within the heater. When tests by plaintiff's experts failed to find such a defect, Honeywell was dropped as a defendant, and the "dust-particle" theory was developed. In the opinion of defendant's experts the "dust particle" theory was "quite speculative" and "extremely improbable."

This suit was filed October 12, 1979, just three days before limitations would have run. So far as appears from the record, this was the first notice Montgomery Ward had of the fire or of plaintiff's claim that its space heater installed in 1964 had caused the 1977 fire. Under the circumstances, the difficulties which confronted defendant in investigating plaintiff's responsibility for the fire two or more years after the event are manifest.

Basically, defendant had little more than the reports of the Fire Marshall and other members of the fire department which concluded that the cause of the fire was "probably" or "possibly" smoking. And clearly, the physical evidence as seen and examined by the fire department personnel, was consistent with the finding of a fire caused by careless smoking. Also supportive of this theory was evidence that plaintiff was a cigarette smoker, that unlighted cigarettes were found on the living room furniture, and that when plaintiff was examined in the hospital's emergency room there was an odor of alcohol on her breath.

Plaintiff testified unequivocally that she had worked for several months six days a week as the full time day bartender at a neighborhood tavern (North Hill Tap) owned by her steady "date" Jack Mercer (who did not testify); that on October 15, 1977, just as on the other days of the week she had worked from 7 A.M. to at least 6 P.M.; that she never drank while at work, but that after her October 15th work day was over and before leaving the tavern she drank one beer in the company of her employer-friend, following which an unnamed couple, customers in the tavern, who were on their way out of town going in her direction, drove her home (she had missed the bus); that she had heard that the male of the couple, an itinerant construction worker, had since passed away, and that his wife was a complete stranger whom plaintiff had never seen before (and inferentially, since) that day; that after taking care of her dog's needs,

she drank one other beer and smoked a cigarette in the kitchen, and then spoke on the telephone to her daughter and mother; that by that time she was utterly exhausted by her long working hours, so she put on her nightgown, eschewing her bed, and laid down on her living room sofa and promptly fell asleep. Plaintiff specifically denied ever smoking in the living room except on very rare occasions, of which the evening of October 15, 1977 was not one.

With respect to the occurrence itself, plaintiff testified that while half asleep she heard a loud noise and, without knowing why, she groped her way first to the front door, which she could not open, and then to the clothes closet (where she was later found by the firemen). She disclaimed any knowledge of flames, heat or smoke in the living room or that a fire had been or was in progress,[3] and testified that she didn't even realize she had been burned about her face and body, although she experienced pain in her hands.

The evidence which defendant sought to adduce through Ms. Gerry Ballard, the newly discovered witness, was clearly relevant (as the magistrate held), not only as circumstantial evidence supportive of defendant's theory, but also as tending in several important respects to refute plaintiff's testimony. Thus, Ms. Ballard placed plaintiff at about 4:30 p.m. in another tavern (Hilltop Inn) where Ms. Ballard was a bartender, this being more than an hour and a half before plaintiff testified that she had left her place of employment. So, too, Ms. Ballard asserted that plaintiff was then in an intoxicated condition, so much so that while smoking, plaintiff was unable to consistently "hit" the ashtray with the ashes from her cigarettes, with the result that Ms. Ballard was compelled to repeatedly wipe up the area in front of plain-

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[3] Contrariwise, her doctor testified that the "basic history" given to him by plaintiff when she was questioned at the time of her admission to the hospital was "essentially" the statement that "she awoke to find a room in flames and herself and her clothing on fire."

tiff's seat. And finally, according to Ms. Ballard, a Mr. and Mrs. Carl Bono, regular patrons of Hilltop Inn, with whom plaintiff was conversing, introduced Ms. Ballard to plaintiff on the occasion in question, and it was the Bonos who left the tavern with plaintiff. On the following day, Ms. Ballard became aware that plaintiff (whom she had never previously met) had been injured in the fire.

In our consideration of this appeal we start with the premise that "a district court may exclude from evidence at trial any matter which was not properly disclosed in compliance with the Court's pre-trial order, and such a ruling will be reversed on appeal only for abuse of discretion." *Iowa-Mo. Enterprises, Inc. v. Avren*, 639 F.2d 443, 447 (8 Cir. 1981); *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 897-98, (8 Cir. 1978). In the usual situation in which the district court was held not to have abused its discretion in excluding the testimony of a witness who was not listed or otherwise timely identified (e.g. *Case v. Abrams*, 352 F.2d 193, 196 (10 Cir. 1965)), "(t)he witness was not newly discovered, nor was the nature of his testimony first disclosed after the pre-trial order." No such situation is here present.

In the instant case, the existence of an apparently disinterested witness, Gerry Ballard, and the nature of the testimony she was expected to give was in fact newly discovered. Defendant had no basis (years after the event) to question the statement of plaintiff as testified to in her discovery deposition that she had worked until after 6 P.M. without imbibing any alcoholic beverages, nor her further testimony that an unnamed couple had driven her from her place of employment at North Hill Tap because it was too late to go by public transportation. So, too, there was no known or available witness who could dispute the testimony of plaintiff as well as that of her daughter and mother that plaintiff was a very careful smoker at all times and that she was not intoxicated on the fateful evening of October 15, 1977.

The relevance and materiality of the testimony of Ms. Ballard is obvious. It could well have produced a different result had the jury been permitted to hear it, particularly in light of the "speculative" explanation of the cause of the fire as given by plaintiff's expert witnesses. The sole ground upon which the magistrate refused to permit defendant to amend its witness list as requested shortly before jury selection was to commence and to allow the proferred testimony was that the request was "untimely", in that it would be "grossly unfair" to plaintiff "*no matter what the reason*" for defendant's late discovery of the witness. Defendant's diligence in discovering the witness was not then questioned by the magistrate nor, for that matter, by the plaintiff.

Defendant's offer to make its newly discovered witness available for deposition at the courthouse was ignored. Instead, the primary ground of plaintiff's objection that she would be prejudiced if the requested amendment of its witness list were allowed was that the late disclosure of the witness deprived her counsel of an opportunity "to interview *other* witnesses with whom plaintiff may have been associating before she went to her home." Amplifying this objection plaintiff's counsel argued that the *three* members of the firm representing plaintiff who were in court "are the only ones really in the office who have any specific and general knowledge of the case, and *we* will have absolutely no opportunity to build up the number of witnesses that we feel would be available in the event that the testimony is allowed."

It would appear, in light of plaintiff's sworn insistence that she was in North Hill Tap continuously until after 6 P.M. (and therefore could not have been in Hilltop Inn) when she left for home, the principal witness who could have corroborated her would have been Jack Mercer (whose failure to testify is not explained of record). Any patron of the tavern who could remember (four years after the event) when and how plaintiff left that evening,

would, if available, be known either to plaintiff or to Mercer. So, too, we are not advised of any reason why either one of the three attorneys who were at the trial or any other associate of (or investigator for) the law firm could not have interviewed any witness who conceivably might have knowledge supportive of plaintiff's testimony. We note that the trial of this case extended over a period of more than a week.

We do not underestimate the importance of requiring timely compliance with pre-trial orders. On the other hand, a trial court should not adhere blindly to the letter of the order "no matter what the reason" for a party's non-compliance. We note that the magistrate expressly exonerated defendant from any implication of bad faith in failing to "timely" list the witness and found that such failure was not a trial tactic. Cf. *De Marines v. KLM Royal Dutch Airlines*, 580 F.2d 1192 (3 Cir. 1978).

On the premise of the magistrate's ruling, a party could never obtain a new trial on the ground of post-trial newly discovered evidence either under Rule 59 or under Rule 60(b)(2), FRCP. Granted that "a motion for new trial on the ground of newly discovered evidence is viewed with disfavor" (*Edgar v. Finley*, 312 F.2d 533, 536 (8 Cir. 1963)), a denial of such a motion is nevertheless reversible if the trial court abused its discretion. In the present case, the new evidence was discovered *before* the trial commenced, so that the time and expense of a new trial could have been avoided had the evidence been allowed or a continuance been granted had plaintiff requested one.[4]

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[4] Plaintiff argues that the failure of *defendant* to request a continuance upon learning of the new witness precludes it from asserting error. Plaintiff is mistaken. Defendant had no reason and was under no duty to move for a continuance. On the other hand, if plaintiff deemed that additional time was necessary for her to investigate the facts, defendant may not be faulted by reason of *plaintiff's* failure to request a continuance.

As appears supra, we have concluded that under the circumstances of this case, the court abused its discretion in denying defendant's request to amend its witness list by adding the name of Gerry Ballard and in refusing thereafter to grant defendant a new trial.[5]

Reversed and remanded for a new trial.

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[5] In connection with its motion for a new trial, defendant has submitted additional evidence newly discovered after the trial, testimony of Ronald V. Rourke, the divorced husband of plaintiff's daughter, who sought out defendant's counsel and swore generally and specifically that plaintiff had an alcohol problem and was a careless smoker. He further swore that on the night the fire occurred his then wife informed him that plaintiff had been drinking and was sent home by Mercer for that reason. His testimony, if believed by the jury, would be corroborative of that of Ms. Ballard. Admittedly, there was "bad blood" between Rourke and his former wife. However, we need not determine whether this evidence, of itself, would warrant a new trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

Civil No. 79-141-D-2

MARJORIE LOUISE DABNEY,
*Plaintiff,*

vs.

MONTGOMERY WARD & CO., INCORPORATED,
*Defendant.*

[Filed Dec. 2, 1981]

## ORDER

This matter is now before the Court upon the Motion for Judgment Notwithstanding the Verdict filed by the defendant on October 1, 1981, or, in the alternative, for a New Trial, or to Alter or Amend the Judgment, filed by the defendant on October 5, 1981. Plaintiff filed a resistance on October 14, 1981. Also before the Court is plaintiff's Motion for Order to Amend Judgment Entry filed November 2, 1981, and Motion for Order Re Security, filed November 2, 1981. Consideration of the motions is governed by the following applicable law.

### I. *Applicable Law and Discussion*

#### A. *Motion for Judgment N.O.V.*

Even where federal jurisdiction is founded on diversity, the standard of review with respect to motions for judgment N.O.V. and for new trial is determined by federal law. *Brown v. Royalty*, 535 F.2d 1024, 1027 (8th Cir. 1976); *Nodak Oil Co. v. Mobil Oil Corp.*, 533 F.2d 401, 410 (8th Cir. 1976).

On a motion for judgment N.O.V., the court is concerned with what the jury actually found, not with what

the jury could have found. *Nodak Oil, supra*, at 407. In ruling on such a motion, the court has a duty to accept the non-moving party's version as true; notwithstanding the existence of strong evidence to the contrary. *Simpson v. Skelly Oil Co.*, 371 F.2d 563, 567 (8th Cir. 1967).

It is not the trial court's function to retry the case or to be concerned with the weight of the evidence. *Simpson, supra.* Conflicts in testimony are to be disregarded and the evidence most favorable to the non-moving party is to be accepted as true. Every legitimate inference that may be drawn, therefore, must be drawn in favor of the decision of the trier of fact. *Nodak Oil, supra*, at 407.

Where insufficiency or insubstantiality of the evidence to support the jury verdict is an issue, the court must uphold the verdict "unless reasonable minds, viewing the evidence in the light most favorable to the prevailing party, could *only* have found *otherwise* than the fact finder." *Mizell v. United States of America*, No. 80-2079, slip op. at 8 (8th Cir., filed October 29, 1981) (emphasis in original); *McCamley v. Shockey*, 636 F.2d 256, 258 (8th Cir. 1981); *Zoll v. Eastern Allamakee Community School District*, 588 F.2d 246 (8th Cir. 1978).

B. *Motion for New Trial*

A motion for a new trial is independent from a motion for judgment N.O.V. and is governed by different principles. *Nodak Oil, supra*, at 410. On such a motion, a trial court has a wider, though not unlimited, latitude than on a motion for judgment N.O.V. and may set the verdict aside where it is against the weight of the evidence or to prevent the miscarriage of justice. *Simpson, supra*, at 570.

On a motion for new trial, the case should be examined, not in a light most favorable to the non-moving party, but according to the analysis and appraisal of the trial court of the weight of all the evidence and also consider-

ing any other relevant factors. *Simpson, supra.* However, the trial court should not grant a new trial merely because it believes another result would be more reasonable; nor should a new trial be granted where there is no valid or useful purpose for submitting the case to another jury. *Fireman's Fund Ins. Co. v. AALCO Wrecking Co.*, 466 F.2d 179, 187 (8th Cir. 1972). Where the subject matter of the litigation is simple, where there exists no complicated evidence, or where the legal principles involved are such that they would not confuse the jury, the court should be reluctant to grant a new trial. *Fireman's Fund, supra.*

A verdict may be set aside under FED. R. CIV. P. 59, providing for new trial, even if there was substantial evidence to support the verdict, if the court finds that the verdict was against the weight of the evidence, or was so excessive as to shock the court's conscience. *Milos v. Sea-Land Service, Inc.*, 478 F.Supp. 1019 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 574 (2nd Cir. 1980), *cert. denied*, 101 S. Ct. 360 (1980). The power to grant a remittitur is considered an adjunct of the power to grant a new trial when the judgment is excessive. The standard is whether there is no basis on which a reasonably responsible jury could have found the particular verdict within the framework of the correct law and the admissible evidence. *Thornton v. Equifax, Inc.*, 467 F.Supp. 1008 (E.D. Ark. 1979), *rev'd on other grounds*, 619 F.2d 700 (8th Cir. 1980), *cert. denied*, 101 S. Ct. 108 (1980).

Rule 59 also provides for a motion to alter or amend the judgment. Such motion is available to a movant seeking to have an order vacated. *American Family Life Assurance Co. v. Planned Marketing Associates*, 389 F. Supp. 1141, 1144 (D. Va. 1974). *See* 11 C. Wright & A. Miller, Federal Practice & Procedure, Civil, § 2817, at 111 (1973). However, the court cannot amend the judgment by adding to the amount of damages awarded because this would constitute a denial of the right to trial

by jury. *See Davis v. Naviera Aznar S.A.*, 37 F.R.D. 223 (D. Md. 1965).

C. *Defendant's Motions*

In its motions defendant asserts that there is a total lack of evidence to support opinions made by plaintiff's experts, and that the opinions were not based upon a reasonable degree of scientific certainty. Defendant further asserts that the jury could only have relied on speculation and conjecture as an evidentiary standard to analyze the issue of proximate cause. Moreover, it is defendant's contention that the evidence did not support an inference that the heating unit was the proximate cause of the fire, but did support equal inferences as to the cigarette and the heating unit as the cause of fire. Defendant alleges that the verdict was excessive and based on passion and prejudices from the damages and not on the issue of liability. Finally, defendant also bases its motion for new trial on the grounds that there may have been witness misconduct at trial.

At the hearing on post-trial motions defendant specifically relied on the recent Iowa Court of Appeals decision of *Wernimont v. International Harvester Corp.*, 309 N.W. 2d 137 (Iowa App. 1981), for the proposition that where an issue is proven by circumstantial evidence, the evidence "must be sufficient to make the theory reasonably probable, and more probable than any other theory based on the evidence." *Id.* at 141. Defendant asserts that this proposition from *Wernimont* is applicable herein because there was no evidence other than that of two experts to corroborate plaintiff's theory of the proximate cause of the fire, and because the jury was given insufficient evidence and standards to weigh the testimony due to the proximate cause instruction given. Defendant claims that its requested instruction on proximate cause should have been given because it more clearly expressed the standard regarding circumstantial evidence and the inferences that can be gathered from it.

Defendant's circumstantial evidence argument is not without merit. However, the Court finds that it is not convincing in this case. Defendant did not except to the proximate cause instruction given. Circumstantial evidence may cause some proof problems regarding the probability of a particular theory, yet it is significant that the Iowa Court of Appeals in *Wernimont* noted that direct and circumstantial evidence are "equally probative." *Wernimont, supra,* at 141. The Court's instruction on proximate cause was not erroneous.

In support of its motion for new trial defendant asserts that the testimony of Connie Rourke, the plaintiff's daughter, may have been substantially in error.[1] Defendant further asserts that the possibility of erroneous testimony coupled with this Court's denial of allowing defendant's last-minute witness, Geraldine Ballard, to testify, constitute a basis for the granting of a new trial. Attorneys for both parties agree that no bad faith was involved in the late presentation of potential witness Ballard. Defendant's attorney had learned of the witness from one of defendant's managers. However, it is not clear how long the defendant's manager had knowledge of the witness. The Court recognizes that no bad faith on the part of the attorneys was involved regarding the late witness. The Court is of the opinion, however, that it did not abuse its discretion in refusing testimony by this witness due to such late notice on defendant's part. The Court also notes that the defendant did not move for a continuance upon learning of Ms. Ballard.

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[1] In support of the allegation of witness misconduct, the defendant filed Exhibits 28 and 29 at the hearing on post-trial motions November 10, 1981. Exhibit 28 is a sworn statement made by Ronald Rourke, Connie Rourke's ex-husband. Exhibit 29 is the sworn statement of Mary Rourke, mother of Ronald Rourke. Also included in the record is an affidavit of Ronald Rourke, filed by the defendant October 5, 1981. The plaintiff filed an affidavit of Connie Rourke October 14, 1981.

In general, plaintiff's resistance to defendant's motions is that the evidence was sufficient on the issue of proximate cause and the expert testimony was based on a reasonable degree of scientific certainty, and even if not based on scientific certainty, such certainty is not required for the admission of opinion evidence. Further, plaintiff claims that the proposed witness, Geraldine Ballard, was properly prohibited from testifying at trial due to the late hour and the prejudice plaintiff would have otherwise suffered. Also, plaintiff asserts that the testimony of Connie Rourk was truthful at trial, and any allegations regarding possible misconduct on her part at trial are without merit. Moreover, plaintiff claims that the verdict was not excessive in light of the plaintiff's damages, medical expenses, and pain and suffering.

After considering defendant's allegation regarding possible witness misconduct and plaintiff's response, the Court finds that the motion for new trial should be denied. The time for discovery and investigation was prior to trial. Furthermore, the Court finds that in light of the applicable law the Court should deny defendant's other post-trial motions. The verdict was clearly supported by the evidence.

D. *Plaintiff's Motions*

In plaintiff's Motion for Order to Amend Judgment Entry plaintiff asks for the judgment entry to include pre-judgment interest accruing from the date of the filing of plaintiff's complaint, October 12, 1979, under Iowa Code § 535.8 (1981), at the rate of 10 percent per year to and including the date of the judgment entry.

Defendant asserts that the proper time period for interest to begin is September 23, 1981, the date of the judgment entry, because operation of the statute as of the date of filing would constitute retrospective operation. The language of section 535.8(2) indicates that the statute does not affect any judgment or decree entered

before January 1, 1981, but otherwise was to become effective January 1, 1981. The Court finds that section 535.8 of the Iowa Code should be applied in this case, as it applies to judgments entered after January 1, 1981. Plaintiff's motion for order to amend judgment entry to include interest as of the date of filing is granted.

Pursuant to Rule 62 of the Federal Rules of Civil Procedure, the plaintiff also moves the Court to order security to the plaintiff in the form of supersedeas bond. The defendant has advised the Court that there would be a cost of a $6,000.00 premium on a $1.3 million bond. In view of the amount of the premium and the fact that there is nothing in the record to indicate that defendant would not be able to pay the judgment if it is affirmed on appeal, the Court finds that the defendant should be able to obtain a stay under Rule 62 by posting a supersedeas bond in the amount of $500,000.00.

## II. *Conclusion*

Following the applicable law in the present case, the Court finds no basis for granting the defendant's post-trial motions for new trial, for judgment notwithstanding the verdict, or to alter or amend the judgment.

In addition, the Court finds that the jury was properly instructed under the applicable law.

Further, the Court finds that the plaintiff's motion to amend judgment entry to include 10 percent interest as of the date of filing is granted. Plaintiff's motion for an order providing for security is also granted.

Accordingly,

IT IS ORDERED that defendant's Motion for Judgment Notwithstanding the Verdict or, in the alternative, Motion for New Trial, or Motion to Alter or Amend the Judgment, are denied.

IT IS FURTHER ORDERED that plaintiff's Motion to Amend Judgment Entry and Motion for Order Re Security are granted. Defendant is hereby ordered to post a supersedeas bond in the amount of $500,000.00 if it desires to obtain a stay on the execution of judgment pending appeal.

Dated this 2nd day of December, 1981.

/s/ R. E. Longstaff
R. E. LONGSTAFF
U.S. Magistrate

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1981

No. 82-1062

MARJORIE LOUISE DABNEY,
*Appellee,*

vs.

MONTGOMERY WARD & CO., INCORPORATED,
*Appellant.*

JUDGMENT

This appeal from the United States District Court for the Southern District of Iowa was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, reversed and remanded to the said District Court for proceedings consistent with the opinion of this Court.

August 18, 1982

A TRUE COPY.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1982

No. 82-1062

MARJORIE LOUISE DABNEY,
*Appellee,*

vs.

MONTGOMERY WARD & CO., INCORPORATED,
*Appellant.*

Appeal from the United States District Court
for the Southern District of Iowa

Petition of appellee for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

October 19, 1982

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1982

No. 82-1062

MARJORIE LOUISE DABNEY,
*Appellee,*

vs.

MONTGOMERY WARD & CO., INCORPORATED,
*Appellant.*

Appeal from the United States District Court
for the Southern District of Iowa

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

October 19, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

Civil No. 79-141-D-2

MARJORIE LOUISE DABNEY,
*Plaintiff,*

vs.

MONTGOMERY WARD & CO., INCORPORATED,
*Defendant.*

PARTIAL TRANSCRIPT

Monday, September 14, 1981

The above-entitled matter came on for trial at 1:05 p.m.

BEFORE:

THE HONORABLE R. E. LONGSTAFF, Magistrate, and a Jury.

[2] PROCEEDINGS

(The following record was made in chambers outside the presence of the Jury.)

* * * *

(Discussion off the record.)

THE COURT: Okay.

[RESPONDENT'S COUNSEL]: Fine. We have—Your Honor, I don't [3] know if this needs to be on the record at this point.

THE COURT: Off the record.

(Discussion off the record.)

[RESPONDENT'S COUNSEL]: When the representative from the local Montgomery Ward store came up to meet with me this morning, he informed me that he had heard some information about Plaintiff's activities on the night of the fire. I traced that down to the original source. The original source saw the Plaintiff before the fire and would testify that the Plaintiff was, in fact, intoxicated when she left the tavern before going, purportedly, to her home.

This issue is not a totally complete surprise, because we have stipulated and have informed the Plaintiffs that we are bringing in a nurse from the hospital at Burlington who will testify that while in the emergency room, she smelled alcohol on the breath of the Plaintiff.

[RESPONDENT'S COUNSEL]: But the witness is new.

[PETITIONER'S COUNSEL]: Your Honor, we're going to object to it, because it is, in fact, a complete surprise, but we have the alleged breath odor in the hospital with a number of witnesses and feel secure in our presentation of that issue. However, we have not had an opportunity, obviously, to interview other witnesses with whom the Plaintiff may have been associating with immediately before she went to her home. We feel that it's extremely prejudicial at this late date to [4] the presentation of the Plaintiff's case.

THE COURT: Who is the—well—

[RESPONDENT'S COUNSEL]: The individual?

THE COURT: The individual, I realize, is Mr. Ballard.

[RESPONDENT'S COUNSEL]: It's a female.

THE COURT: Oh, Gerry Ballard?

[RESPONDENT'S COUNSEL]: Yes. She is the bartender in the tavern.

THE COURT: Well, has the person who told you, the representative of the Montgomery Ward store, been deposed at all?

[RESPONDENT'S COUNSEL]: I have talked to this individual. I have talked to the bartender today.

THE COURT: I know. But the person—

[PETITIONER'S COUNSEL]: She's never been noted as a proposed witness. We never had any indication that he was going to have any information.

THE COURT: He's just the representative.

Well, it's always extremely disturbing when something like this comes up at this late minute. I think at this time I'm not going to allow the testimony. I would be willing to take an offer of proof outside the presence of the Jury, if you want to make it, and then I would only, probably, allow it if I felt it was not unduly prejudicial to the Plaintiff.

At this late date, if I find it was prejudicial, I would just keep it out as being untimely.

[5] [RESPONDENT'S COUNSEL]: How do you want us to make the offer of proof?

THE COURT: Do you need to have an individual testify or can you just make a statement orally as to what she would testify to?

[PETITIONER'S COUNSEL]: Your Honor, in the event—and I believe the Court will find that it is prejudicial, but in the event that the Court should not find it is prejudicial, I'm curious as to how a ruling such as that will affect Plaintiff's counsel inasmuch as all three of us are the only ones really in the office who have any specific and general knowledge of the case, and we will have absolutely no opportunity to build up the number of witnesses that we feel would be available in the event that the testimony was allowed.

THE COURT: Well, you were aware, I assume, that there would be some evidence that she had been drinking that night; is that correct?

[PETITIONER'S COUNSEL]: Let me explain it this way: We were aware of smelling alcohol on her breath, yes. We made specific inquiry to Defendant's counsel: Would there be any testimony about intoxication? He replied in the negative. The problem this presents to us right now is—

THE COURT: Okay. I'm just going to find that it's untimely. I'm not going to allow it. I'm not going to allow the witness list to be amended at this late date; not [6] when the trial was supposed to start 15 minutes ago. I feel it's just too late. Okay.

[RESPONDENT'S COUNSEL]: We would, for the record, Your Honor, state that we would make the witness available for depositions here in Davenport.

THE COURT: I understand that, and I understand you did it in good faith. I just wish he had told you about—you know, if he told you 10 days ago—If he had told you 10 days ago, I don't think we would have had the problem. We would have been able to go ahead, but this is just too late, 1:15.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

Civil No. 79-141-D-2

MARJORIE LOUISE DABNEY,
*Plaintiff,*
vs.
MONTGOMERY WARD & CO., INCORPORATED,
*Defendant.*

VOLUME VII

Monday, September 21, 1981

The above-entitled matter came on for further trial at 9:30 a.m.

BEFORE:

THE HON. R. E. LONGSTAFF, Magistrate, and a Jury.

[822] PROCEEDINGS

(The following was had in open Court, outside the presence of the Jury.)

THE COURT: I will be giving you copies of the instructions any minute now, but before we do that, we do have an offer of proof for the Defendant to make. You could make that now, or you could reserve the right to make that until after we instruct the Jury. Would you have any preference, Mike?

[PETITIONER'S COUNSEL]: For the record, the Plaintiff would stipulate to allowing the Defendant to make its offer of proof at that point.

[RESPONDENT'S COUNSEL]: After the Jury retires?

[PETITIONER'S COUNSEL]: That's correct.

THE COURT: I think we have already discussed the fact that it pertains to the matter of the witness I have already excluded, does it not?

[RESPONDENT'S COUNSEL]: Yes, Your Honor, and it would be very brief, if you want to get rid of it right now.

THE COURT: Since we don't have the instructions here, you might as well go ahead.

[RESPONDENT'S COUNSEL]: Your Honor, at this time the Defendant would make an offer of proof by way of stating that if allowed to call the witness Gerry Ballard, who resides at 832½ North Fifth Street, Burlington, Iowa, she would testify that she was working at the Hilltop Inn, which is a tavern in [823] Burlington, Iowa, on October 15th, 1977; that approximately at 4:30 p.m. on October 15, 1977, Marjorie Dabney entered the Hilltop Inn and talked to a couple other patrons at the bar, the patrons being Carl Bono, B-o-n-o, and his wife, who Mrs. Ballard knew as regular patrons. They introduced her to Mrs. Dabney, and she generally tended bar in the area where Mrs. Dabney was seated.

It would be her recollection and her testimony that Mrs. Dabney was intoxicated; that she was unable to consistently hit the ashtray with the ashes from her cigarettes, which caused Mrs. Ballard to repeatedly wipe up the area in front of where Mrs. Dabney was seated. It's her recollection that Mrs. Dabney left with Mr. and Mrs. Bono, and on the day following which would be Sunday, Mrs. Ballard became aware that the patron, Mrs. Dabney, was injured in this fire, which was why she recalls this series of events. She had never met Mrs. Dabney before that evening.

That would be—The Defendant would request the Court's leave to amend its witness list to add this witness and allow this testimony as it relates to the point of intoxication and safety of smoking materials.

THE COURT: Thank you. I believe that the first time the Court, and I believe the first time the Plain-

tiffs' counsel were made aware of this witness was on the day we commenced jury selection, or were you informed of that [824] previously?

[PETITIONER'S COUNSEL]: No, that's right, Your Honor. Your first statement is correct.

[RESPONDENT'S COUNSEL]: I would make a professional statement, that the manager from Montgomery Ward, who was coming up to attend jury selection, informed Defendant's counsel about this about 11 o'clock Monday morning.

THE COURT: Right. I want to say for the record, I am aware this was not a trial tactic on the part of defense counsel, and I know they were completely unaware of the witness until immediately before we started commencing the jury selection. Certainly had we had prior knowledge, I would have allowed the witness list to be amended, but I simply feel under the circumstances, it was grossly unfair to Plaintiff and Plaintiff's counsel to have this type of witness come up at such a late date, no matter what the reason for it was, and it was solely on that basis that I have excluded the testimony of this witness.

The offer of proof is accepted. Certainly the evidence would have been relevant, but I reject it on the basis of it being untimely.

For the record, do you want to say anything further? I think you indicated to me, had you been made aware of that type of witness, you feel you could have had witnesses available—

[825] [PETITIONER'S COUNSEL]: That's correct, Your Honor. We did not have witnesses at that time that would have contradicted that testimony except our own client; however, we would have investigated those circumstances of the case; that is, her conduct before the fire, and we did not have an opportunity to do that.

* * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

Civil Action File No. 79-141-D-2

MARJORIE LOUISE DABNEY,
*Plaintiff,*

vs.

MONTGOMERY WARD & CO., INCORPORATED,
*Defendant.*

[Filed Sep. 23, 1981]

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Ronald E. Longstaff, United States District Magistrate, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that Defendant Montgomery Ward & Co., Incorporated, take nothing and that Plaintiff Marjorie Louise Dabney recover of Defendant, Montgomery Ward & Co., Incorporated, the sum of One Million Dollars and No Cents ($1,000,000.00) and her costs as provided by law.

Dated at Davenport, Iowa, this 23rd day of September, 1981.

JAMES R. ROSENBAUM
Clerk of Court
By: /s/ Diane L. Duncan
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1982

No. 82-1062

MARJORIE LOUISE DABNEY,
*Appellee,*

vs.

MONTGOMERY WARD & CO., INCORPORATED,
*Appellant.*

Appeal from the United States District Court
for the Southern District of Iowa

Appellee's motion to file petition for rehearing out of time be, and is, hereby, denied.

February 15, 1983